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IN THE
COURT OF APPEALS OF INDIANA

DAVID A. JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0608-CR-701
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. 29C01-0508-FD-149

April 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

David Jones ("Jones") appeals the sentence imposed following his jury convictions for battery, a Class D felony, and illegal consumption of alcohol, a Class C misdemeanor. We affirm.

Issue

The sole issue for our review is whether the trial court erred in sentencing Jones.[1]

Facts

At 5:00 a.m. on July 30, 2005, the Noblesville Emergency Service Unit, a SWAT team, executed a no-knock search warrant at the home of Wayne and Wanda Jones. The Joneses were asleep in their bedroom. Their fifteen-year-old daughter, her sixteen-year-old friend, and Jones, the Joneses' twenty-year-old son, were also in the house. Jones was asleep on the living room floor.

After entering the house, the officers identified themselves and told the occupants of the house to get down because the officers were executing a search warrant. Everyone except Jones complied with the officers' orders. Jones began kicking and screaming at the officers. During a struggle, Jones landed on the couch with his hands underneath him and refused officers' requests that he put his hands behind his back.

Officer Bruce Barnes unsuccessfully tried two pressure point techniques on Jones's neck to convince him to put his hands behind his back. Officers eventually twice

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[1] Jones makes no Blakely argument.

used a stun gun on Jones to force him to comply with them. During the struggle, Jones bit Officer Barnes on the arm.

The officers noticed that Jones smelled of alcoholic beverages. Jones admitted that he had consumed approximately eight beers the night before and early that morning.

A jury convicted Jones of battery and illegal consumption of alcohol. Jones's presentence investigation report revealed that Jones has an extensive legal history including juvenile adjudications for public intoxication, disorderly conduct, battery, and intimidation. Jones also has several juvenile adjudications for illegal consumption as well as numerous probation violations.

As an adult, Jones has one felony and seven misdemeanor convictions. This includes multiple convictions for illegal consumption and other convictions for battery, resisting law enforcement, and criminal recklessness. Further, following his arrest in the instant case, Jones was charged with intimidation and public intoxication.

Based upon this extensive criminal history, the trial court sentenced Jones to three years for the Class D felony, with one year suspended and two years to be served on work release. The court also sentenced Jones to sixty days for the Class C misdemeanor, and ordered this sentence to run concurrently with the three-year sentence. Jones appeals only his sentence.

Analysis

We note that Jones committed these offenses after our legislature replaced the "presumptive" sentencing scheme with the present "advisory" sentencing scheme. We are awaiting guidance from our supreme court as to how, precisely, appellate review of

sentences under the new "advisory" scheme should proceed and whether trial courts must continue issuing sentencing statements explaining the imposition of any sentence other than an advisory sentence. See Gibson v. State, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006). This court has split on the issue of whether such statements still must be issued. Compare Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), trans. denied (holding that trial court is under no obligation to find or weigh any aggravating or mitigating circumstances) with McMahon v. State, 856 N.E.2d 743, 749 (Ind. Ct. App. 2006) (holding sentencing statements must be issued any time trial court deviates from advisory sentence).

Whether or not sentencing statements are required, it has been universally recognized that such statements are very helpful to this court in determining the appropriateness of a sentence under Indiana Appellate Rule 7(B). Gibson, 856 N.E.2d at 147. The trial court here issued an oral sentencing statement, and we will utilize it "as an initial guide to determining whether the sentence imposed here was inappropriate." Id. Under Indiana Appellate Rule 7(B), we may revise a sentence that we conclude is inappropriate in light of the nature of the offense and the character of the offender. We do this while considering as part of that equation the findings made by the trial court in its sentencing statement. We understand that this is, by necessity, part of our analysis here, but it does not limit the matters we may consider. See Gibson, 856 N.E.2d at 149; see also McMahon, 856 N.E.2d at 750 (noting that review under Rule 7(B) is not limited "to a simple rundown of the aggravating and mitigating circumstances found by a trial court.").

In reviewing a sentencing statement, we are not limited to a written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings. Corbett v. State, 764 N.E.2d 622, 631 (Ind. 2002). Here, the trial court did not issue a written sentencing statement. Rather, the court supported its decision by its comments at the sentencing hearing. Specifically, the court relied on Jones's extensive legal history, including Jones's numerous alcohol related convictions.

Jones contends that the trial court failed to properly give credit to the following mitigating factors: 1) Jones's resistance neither caused nor threatened serious harm to persons or property; 2) the crime was the result of circumstances unlikely to recur; 3) the victim of the crime facilitated the offense; 4) the defendant acted upon strong provocation and; 5) there are substantial grounds tending to excuse or justify the offense. However, Jones has waived appellate review of this issue because he failed to raise these mitigators to the trial court. See Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (defendant who fails to raise proposed mitigators at the trial court level is precluded from advancing them for the first time on appeal).

Waiver notwithstanding, we find no error. It is within the trial court's discretion to determine both the existence and the weight of a significant mitigating circumstance. Id. Given this discretion, only where there is substantial evidence of significant mitigating circumstances in the record will we conclude that the sentencing court has abused its discretion by overlooking mitigating circumstances. Id. Although the court must consider evidence of mitigating factors presented by a defendant, it is neither required to find that any mitigating circumstances exist, nor is it obligated to explain why

it has found that certain circumstances are not sufficiently mitigating. Id. Further, the court is not compelled to credit mitigating factors in the same manner as would the defendant. Id. An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant on appeal to establish that the mitigating evidence is both significant and clearly supported by the record. Id. This Jones has failed to do.

In considering the entire question of inappropriateness,[2] with regard to the character of the offender, twenty-year-old Jones has an extensive juvenile record including adjudications for public intoxication, disorderly conduct, battery, and intimidation. He also has several juvenile adjudications for illegal consumption as well as numerous probation violations.

As an adult, Jones has one felony and seven misdemeanor convictions. This includes multiple convictions for illegal consumption and other convictions for battery, resisting law enforcement, and criminal recklessness. Further, following his arrest in the instant case, Jones was charged with intimidation and public intoxication. Jones's prior contacts with the law, including terms of probation and incarcerations, have not caused him to reform himself.

With regard to the nature of the offense, an intoxicated Jones refused to comply with the officers' orders. Jones kicked and screamed, and after he landed on the couch with his hands underneath him, he refused the officers' requests that he put his hands behind his back. During the struggle, Jones bit a police officer on the arm. Jones's prior

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[2] Jones argues that his sentence is manifestly unreasonable. However, effective January 1, 2003, Indiana Appellate Rule 7(B) no longer contains the phrase "manifestly unreasonable."

alcohol related and battery convictions show a pattern indicating a disregard for the law. See Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004) (holding that the significance of prior criminal history varies based on the gravity, nature, and number or prior offenses as they relate to the current offense).

Based upon our review of the evidence, we see nothing that would suggest that Jones's three-year sentence for the class D battery conviction is inappropriate.

Conclusion

The trial court did not err in sentencing Jones. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.